

Kris D. Meade
(202) 624-2854
kmeade@crowell.com

May 28, 2004

1220:rls
099230.000001

VIA E-MAIL

Joseph DuBray, Jr.
Director
Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
2000 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. DuBray:

The United States Chamber of Commerce (“the Chamber”) submits the following comments in response to the Notice of Proposed Rulemaking and Request for Comments issued by the Office of Federal Contract Compliance Programs (“OFCCP”) on March 29, 2004, regarding the Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes (“the Notice”). The OFCCP’s Notice follows issuance of “Proposed Interagency Guidance on Applicant Definition Under Uniform Guidelines on Employee Selection Procedures” by the Equal Employment Opportunity Commission, the OFCCP, the Department of Justice, and the Office of Personnel Management (collectively, the “UGESP Agencies”).

STATEMENT OF INTEREST

The Chamber is the world’s largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. The Chamber’s mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. A significant number of Chamber member companies are federal contractors covered by Executive Order 11246 and under the jurisdiction of OFCCP regulations. Proposed changes to the definition of “internet applicant” will have a significant impact on these members.

INTRODUCTION

The Agency's proposed rule establishes a definition of "internet applicant" that provides contractors useful guidance on how to fulfill their recordkeeping obligations. The Chamber commends OFCCP for recognizing that the long-standing criteria of job-related qualifications is integral to the consideration of who is a bona fide applicant. This element of the definition aligns the Agency's regulations with Title VII case law and longstanding employer practices. The Chamber further commends the Agency for its inclusion of the requirement that an applicant be an individual whom the contractor has considered for employment. The Chamber reads this provision as recognizing the business reality that it is often impossible for contractors to consider all potential job candidates, but rather must find a way to narrow their recruitment focus to identify the best individuals for their positions. Recognizing the distinction between recruitment and selection processes is essential to a contractor's ability to take advantage of the technological advances in recruitment, without becoming overwhelmed by the associated burdens that an overly expansive applicant definition could impose.

While the Agency's proposed changes are a step in the right direction, the Chamber is concerned that the Agency's limitation of the applicant definition to individuals who "submit an expression of interest in employment through the internet or related electronic data technologies," will negate OFCCP's laudable efforts. Creating dual standards – one that applies to individuals who express interest through the internet and one that applies to all others – will not serve the stated purpose for the proposed rule – to "clarify how contractors must comply with OFCCP recordkeeping requirements." Instead, dual standards will only generate confusion, inconsistency, and new – unanticipated – burdens. As such, the Chamber encourages OFCCP to extend the principles set forth in the proposed "internet applicant" definition to all applicants, regardless of the manner in which the individual expresses interest in a position.

I. THE PROPOSED "INTERNET APPLICANT" DEFINITION RECOGNIZES BUSINESS REALITIES AND PROVIDES WELCOME GUIDANCE TO FEDERAL CONTRACTORS

The OFCCP's Notice seeks comments on its proposed changes to 41 C.F.R. § 60-1, which govern federal contractors' recordkeeping obligations. These amendments introduce a distinction between traditional "applicants" (thus far undefined by the OFCCP in its substantive regulations) and "internet applicants." The proposed rule sets forth a four-part test for defining an "internet applicant."

- 1) An individual submits an expression of interest in employment through the Internet or related electronic data technologies;
- 2) The employer considers the individual for employment in a particular open position;
- 3) The individual's expression of interest indicates the individual possesses the advertised basic qualifications for the position; and
- 4) The individual does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.

The Agency's proposed amendments provide, for the first time, an applicant definition that will assist contractors in understanding their data collection and analysis obligations. Of particular significance is the inclusion, in the third prong, of job-related qualifications, and the second prong's restriction of "applicants" to those individuals who are actually considered for employment by the company. It is these elements, considered together, that provide a reasonable path for contractors to follow. As detailed below, the Chamber generally endorses these provisions and offers suggestions for further clarification. The Chamber's suggestions are designed to ensure that the final rule is consistent with case law and avoids unnecessary confusion that may detract from the overall effectiveness of this proposed rulemaking.

A. Job-Related Qualifications is an Essential Component of the Applicant Definition

The Chamber applauds the OFCCP's explicit inclusion of job-related qualifications in the applicant definition. However, the Chamber is concerned that the language of 41 C.F.R. § 60-1.3(2)(i) could be construed to broaden the applicant definition to include all candidates who possess the "basic" qualifications for the job.

The issue of minimum qualifications has plagued employers for three decades, and the proposal to limit the scope of internet applicants to those who possess "the advertised basic qualifications for the position" helps bring the Agency's applicant definition, at least as it pertains to internet applicants, in line with Executive Order 11246 and established Title VII case law. See Section 202(2) of E.O. 11246 ("The contractor will, in all solicitations or advancements for employees placed by or on behalf of the contractor, state that all *qualified* applicants will receive consideration for employment without regard to race, color, religion, sex or national origin") (emphasis added); see also McDonnell Douglas v. Green, 411 U.S. 792 (1973) (plaintiff in discriminatory hiring case must demonstrate that he or she was qualified for the position sought).

The inclusion of minimal qualifications allows contractors to track, maintain and analyze data for only those individuals who could actually fill the employer's open positions. Without this provision, contractors would be forced to track every individual who expressed an interest in employment, regardless of his or her qualifications. For instance, an accounting firm seeking an accountant would be required to include as "applicants" individuals who are not certified public accountants; a law firm would be required to include individuals who do not possess law degrees in its "applicant" pool for an associate position. Such exercises do nothing to further a contractor's affirmative action goals or enhance the Agency's enforcement capabilities.

Moreover, the Chamber believes it is important that the Agency's statement that employers "cannot compare the relative qualifications of job seekers to determine which candidates have the best qualifications" is not construed to imply that a candidate becomes an "applicant" simply because he or she possesses the "basic" qualifications for the position. Established case law permits employers to set job qualifications "as high as [they] like []," based on current business needs, and permits employers to craft selection procedures that enable them to identify the best-qualified candidates for the job. See Griggs v. Duke Power Co., 401 U.S. 424, 435 n. 11 (1970). As is evident from the structure of the definition of "internet applicant" proposed by the OFCCP, and from existing case law, employers are not required – and should not be required – to automatically consider all minimally qualified candidates to be "applicants."

**B. "Considers for Employment" Provision May Recognize
Realities of the Recruitment and Selection Process**

Of equal importance to the "basic qualifications" component is the separate requirement that an applicant be someone who was "considered for employment" by the contractor. The Chamber believes this provision recognizes the distinction between recruitment and selection, and addresses the realities employers face when seeking the best candidates for their positions.¹

The internet age has dramatically altered job searching and recruiting. Job seekers can apply to multiple companies with little effort, or post their resumes on

¹ The Chamber also welcomes the requirement that the consideration must be for a "particular open position." This language – similar to the requirement in the UGESP Agencies' definition that "the employer has acted to fill a particular position" – permits contractors to efficiently filter out individuals who express only a generalized interest in employment with the company, rather than interest in a particular job.

national job banks and advertise their skills globally. Contractors receive hundreds, or even thousands, of resumes where they once received only a dozen. It is impossible for most contractors to actually “consider” for employment every individual who expresses interest in an advertised position. Rather, each contractor must cull through the multitude of resumes and applications it receives to identify those individuals best qualified to fill its positions. The culmination of this winnowing process during recruitment efforts is a pool of “applicants” who are considered for employment.

Consider the following example, which demonstrates the importance of the “considered for employment” provision:

Hospital A, a federal contractor, seeks to fill an open position for an emergency room nurse. The hospital places an advertisement on its website, on Monster.com, and in the local newspaper, stating that it is seeking registered nurses with hospital experience. Response to the advertisements is greater than anticipated, and Hospital A receives 100 resumes from persons interested in the position, both via the internet and through the mail. Clerks in the hospital’s recruiting department enter the data from the hard-copy applications into its recruitment database. A recruiter then conducts a keyword search of the database to identify individuals who meet the advertised qualifications of a nursing license and hospital experience. This search retrieves 50 resumes. Lacking the time and resources to review each of these resumes, the recruiter further refines her search by using keywords to identify individuals with emergency room nursing experience. This process narrows her pool to 20 candidates. The recruiter reviews the submissions of the first ten of these individuals and, finding them to be good candidates for the job, sends these ten resumes to the hiring manager responsible for filling the emergency room nurse position. The recruiter seeks race and gender information from each of these ten people.

Though fifty of the candidates meet the basic advertised job qualifications—registered nurses with hospital experience—the hospital is unable to consider all fifty candidates. Thus the recruiter continues the recruitment process by narrowing the pool, through “blind” keyword resume searches, to identify those who warrant consideration.

The Agency’s proposal would deem only those that the employer considers for employment as internet applicants. In the above example, we interpret the provision to require the employer to include the ten people who are “considered” by the recruiter in its applicant pool – *i.e.*, the pool of individuals for whom the hospital

will gather, maintain, and analyze race and gender data. The hospital, in this example, would nonetheless maintain the information submitted by the remaining individuals who expressed interest in the position. As such, the Agency would still be able to analyze the hospital's recruitment processes for adverse impact purposes.

A contractor should not be required to collect, maintain and analyze the race and gender of every person who submits a resume that is entered into a database simply because the contractor then searches that database to identify candidates who possess preferred qualifications for the position. As demonstrated by the example above, the limitation of applicants to those who are "considered for employment" is essential to enable contractors to utilize the benefits of recruiting in this technology age without being unduly burdened by the obligations that an overly broad applicant definition could create.

The Chamber welcomes and supports the "considered for employment" provision to the extent that it may be applied in this way.

C. Negative Phrasing of the "No Longer Interested in Employment" Provision Results in Confusion

While the "basic qualifications" and "considered for employment" prongs of the proposed definition may provide clarity for the contracting community, the Chamber is concerned that the proposed wording of the fourth prong regarding individuals who are "no longer interested in employment" is ambiguous and many result in unnecessary confusion and burden. The proposed definition states that an individual who fulfills the other requirements is an applicant provided the "individual does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual" (emphasis added). The double negative in the language, coupled with the ambiguous term "indicate," suggests that, if an employer attempts to contact a candidate to see if she is interested in a position and receives no response, that candidate may nonetheless be counted as an applicant because she has not taken affirmative steps to "indicate" that she is no longer interested in employment. Such an interpretation would eliminate any benefit derived from including this provision in the definition.

The Agency should revise this prong to resolve any potential ambiguity. The Chamber recommends that OFCCP revise the fourth prong to read as follows: "The individual does not demonstrate that he or she is no longer interested in employment in the position for which the employer has considered the individual, either by expressly disavowing interest in the position or by failing to affirmatively confirm interest in the position in response to employer inquiries."

III. OFCCP SHOULD EXPAND THE INTERNET APPLICANT DEFINITION TO INCLUDE ALL APPLICANTS REGARDLESS OF THE MANNER BY WHICH THEY EXPRESS INTEREST

The Agency's proposed rule, if limited to "internet applicants," would arguably result in two different definitions of the term "applicant," entirely dependent upon how an individual expresses interest: (1) the "Internet Applicant" definition which would apply to candidates who "submit an expression of interest in employment through the Internet or related electronic data technologies," and (2) the far broader definition from the 1979 Uniform Guidelines for Employee Selection Procedures ("UGESP") Questions and Answers, which would arguably apply to all other expressions of interest. The Agency's Notice specifically asks for comments on "whether this dual standard will provide OFCCP with meaningful contractor data to assess in determining whether to commit agency resources into an investigation of a contractor's employment practices." The Chamber responds with an emphatic "no."

The use of dual standards is untenable for two reasons. First, the 1979 UGESP Questions and Answers applicant definition remains contrary to federal case law and – if enforced by the OFCCP – would greatly expand the burdens on federal contractors. Second, the use of two definitions will only result in inconsistent data, dual sets of analyses, greater confusion, and increased burden for contractors.

A. The 1979 UGESP Questions and Answers Applicant Definition is Contrary to Controlling Law

The Agency has previously relied on the applicant definition set forth in the 1979 UGESP Questions and Answers, which defines an applicant as "a person who has indicated interest in being considered for hiring, promotion or other employment opportunities." A strict reading of this definition would force contractors to track every individual who expressed an interest in employment, regardless of his or her qualifications.

The UGESP Questions and Answers definition is inconsistent with Title VII case law, which has long recognized that a valid applicant pool should consist of only those individuals who are qualified for the position sought. See McDonnell Douglas v. Green, 411 U.S. 792 (1973). Similarly, E.O. 11246 expressly applies only to "qualified applicants." See Section 202(2) of E.O. 11246 ("The contractor will, in all solicitations or advancements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin"). The 1979 UGESP Questions and Answers definition also places a tremendous,

unnecessary burden on contractors, who would be required to track unsolicited expressions of interest regardless of whether the contractor is actively filling positions. A contractor who imposes a hiring freeze for all positions would nonetheless be required to consider as “applicants” any person who submits an unsolicited resume.

B. Maintaining Two Definitions Is Illogical and Will Result in Inconsistent Data, Confusion and Unnecessary Burden

The use of two different applicant definitions would result in inconsistent data for analytical purposes, and would place a tremendous burden on contractors. Human Resources departments would be required to implement two systems for seeking voluntary race and gender self-identification from applicants – a situation that would surely result in confusion and inaccurate data collection. Human Resources professionals would also be required to conduct extensive training to explain the multiple definitions and resulting data collection systems to the individuals responsible for collecting and analyzing the data.

Creating a dual system will also create illogical results. Consider Hospital A, discussed above, which received resumes for the emergency room nurse position both via the internet and through the mail. The hospital entered all of the information from the hard-copy resumes into its applicant database and then searched within the database to identify the best candidates for the position. The hospital subjected every expression of interest to the same recruitment process. Pursuant to the proposed dual standard, Hospital A would nonetheless be required to treat the hard-copy resumes differently than the expressions of interest submitted through the internet, simply based on the manner in which the candidate expressed interest. If a candidate who lacked a nursing license sent his resume to Hospital A via regular mail, a strict reading of the 1979 UGESP definition would force the hospital to consider him an applicant. Were the same candidate to submit his resume via the internet, he would not become part of the applicant pool because the proposed internet applicant definition excludes individuals who do not meet the basic qualifications for the position.

The Agency has taken a significant step forward by creating an “internet applicant” definition that is consistent with legal precedent and business realities. The Chamber urges OFCCP to avoid the inconsistency, confusion and burden of two standards. The Agency can eliminate the specter of such confusion and burden simply by expanding the proposed definition of “internet applicants” to incorporate all applicants, regardless of the manner in which they choose to express interest.

IV. OTHER CONCERNS REGARDING THE PROPOSED RULEMAKING

A. The OFCCP's Use of Labor Force Statistics May Result in Inaccurate Comparative Data

The Analysis section of the Agency's Notice states that "the agency will rely on labor force statistics or other relevant data for enforcing E.O. 11246 with respect to recruitment processes that occur prior to collection of gender, race and ethnicity data." It is the Chamber's understanding that the OFCCP will use labor force statistics as an initial compliance assessment tool only, and that (1) contractors will not be required to conduct adverse impact analyses of their recruitment practices using labor force statistics, and (2) the Agency will not use this data to reach definitive conclusions regarding recruitment practices. As noted in greater detail below, any such requirements would generate significant additional burden and raise serious practical analytical problems. It is the Chamber's understanding that OFCCP will use these labor force statistics, as it has historically done, only to determine whether there should be further investigation of the recruitment practice, and will not use labor force statistics as a basis for alleging discriminatory conduct. If these understandings are correct, the Chamber does not oppose OFCCP's stated intent to use labor statistics data. The Chamber urges OFCCP to explicitly include these understandings.

The Chamber is concerned, however, that the 472 census occupational classification codes are, at the same time, likely too broad and too narrow to capture an appropriate applicant pool for any number of the multitude of jobs that exist in the country's workforce. The occupational classification codes attempt to squeeze hundreds of thousands of jobs into fewer than 500 categories. Oftentimes, an employer struggles to find a direct correlation between the positions in its workforce and the census occupational classification codes. Additionally, most of the occupational classification codes do not account for specialization within a field. While there may be an occupational classification for registered nurses, there is no distinction made between an emergency room nurse and a pediatric nurse. Further, none of the occupational classification codes accounts for years of experience. Given the limitations of the occupational classification codes, the Chamber believes that a contractor's candidate and applicant data will often provide a better metric than generic census data to determine the demographics of the appropriate applicant pool.

B. Record Retention Language Should be Narrowed to Reflect a Reasonableness Standard

The record retention requirements in 41 CFR § 60-1.12(c) raise two issues that the Agency should address in its final rule. First, Section 60-1.12(c)(1)(ii) states that a contractor must identify “*where possible*, the gender, race and ethnicity of each applicant.” This language is overly broad and suggests no limitations based on expense, burden, or time commitment. The Chamber recommends that the language be revised to state that a contractor must identify the gender, race and ethnicity of each applicant “*where feasible*.” This substitute language would incorporate a reasonableness standard into the data collection obligation.

Second, Section 60-1.12(a) requires contractors to retain “applications, resumes, and any and all employment submissions through the Internet or related electronic technologies.” A strict reading of this regulation would require employers to search all the computer and paper files of each of its employees to identify any expressions of interest that were sent to someone in the company but were never routed through the appropriate channels to those responsible for recruitment and hiring. This is an unrealistic burden, and one that the Chamber does not believe the Agency intended to impose upon contractors.

Moreover, this requirement would create substantial new recordkeeping obligations, particularly for the multitude of contractors who have established standard procedures for receiving expressions of interest and who do not accept expressions of interest that fail to conform to their standard procedures. For instance, many contractors have established procedures whereby candidates submit expressions of interest by completing an electronic “profile,” and those contractors do not currently accept resumes or other expressions of interest. The OFCCP should recognize this reality, and refrain from imposing upon contractors an obligation to maintain records – electronic or otherwise – that fail to comport with the contractor’s standard procedures. To address both concerns, the Chamber recommends that the Agency clarify the language to incorporate the principle from the UGESP Agencies’ guidance that collection and retention requirements be limited to expressions of interest that “follow the employer’s standard procedures for submitting applications.”

C. The Burden Estimate Significantly Underestimates the Time and Expense Required for Compliance

The OFCCP’s Paperwork Reduction Act statement repeats “verbatim” the statement submitted by the UGESP Agencies in the Proposed Interagency Guidance on Applicant Definition Under Uniform Guidelines on Employee Selection

Procedures. As the Chamber explained in its submission in response to the UGESP Agencies' Request for Comments, this burden estimate is unrealistic.

The UGESP Agencies estimated a total recordkeeping cost of approximately \$37.5 million, based on its assumptions that:

- a) Each of the 865,962 "covered employers" will maintain "one record per employee;"
- b) Individuals seeking employment submit, on average, five applications to the universe of covered employers;
- c) The current cost per hour of personnel for UGESP recordkeeping is \$14.75; and
- d) The "basis for the estimate of the cost per record has not changed since the initial burden calculations in 1979."

The burden estimate underestimates the actual cost and burden associated with applicant recordkeeping. First, employers will likely maintain more than "one record per employee" or applicant. Many employers capture resumes and other expressions of interest in a computerized database and then run multiple searches for qualified candidates whenever a position becomes available. The employer will create a new record each time an individual is identified in a database search.

Additionally, the assumption that an individual will only submit five applications is unrealistic given the ease with which job seekers can now send their resumes to multiple employers with the click of just a few buttons. Finally, the UGESP Agencies' estimate calculates the hourly recordkeeping burden at less than three hours per covered employer. This is unrealistic given the scope of a contractor's ongoing recordkeeping obligations.

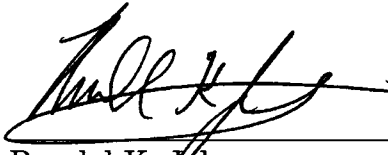
* * * *

Joseph DuBray, Jr.
May 28, 2004
Page 12

Thank you for the opportunity to submit these comments on behalf of the United States Chamber of Commerce. The Chamber urges the OFCCP to consider the issues raised herein and incorporate its recommendations into the final regulation.

Respectfully submitted,

U.S. CHAMBER OF COMMERCE



Randel K. Johnson
Vice President, Labor, Immigration and
Employee Benefits
Michael J. Eastman
Director, Labor Law Policy
1615 H Street, N.W.
Washington, D.C. 20062-2000
(202) 659-6000

CROWELL & MORING, LLP



Kris D. Meade
Rebecca L. Springer
Counsel for the U.S. Chamber of Commerce
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500